

SUBMITTED VIA ECFS

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

**In the Matter of
Request for Review by UTEX
Communications Corp. d/b/a
FeatureGroup IP (Filer ID 825102) of
Decision of Universal Service
Administrator**

§
§
§
§
§
§

WC Docket No. 06-122

**UTEX COMMUNICATIONS CORP. d/b/a FEATUREGROUP IP REQUEST FOR
REVIEW OF USAC ADMINISTRATOR DECISION**

W. Scott McCollough
General Counsel
1250 S Capital of Texas Hwy
Bldg 2-235
West Lake Hills, TX 78746
(V) 512.888.1112
(FAX) 512.692.2522
scott@worldcall.net

December 19, 2011

SUBMITTED VIA ECFS

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of Request for Review by UTEX Communications Corp. d/b/a FeatureGroup IP (Filer ID 825102) of Decision of Universal Service Administrator	§ § § § § §	
		WC Docket No. 06-122

TABLE OF CONTENTS

EXECUTIVE SUMMARY	iv
I. HISTORY AND BACKGROUND	1
II. STATEMENT OF QUESTIONS PRESENTED FOR REVIEW	9
III. ARGUMENT ON QUESTIONS PRESENTED FOR REVIEW	10
<p>A. The Administrator was not rendering a decision on an “appeal” of USAC’s “initial rejection” of FeatureGroup IP’s revised 2009 499A. The Administrator’s “Decision” is the first formal action by USAC. The original tentative intention to “reject” the revised 2009 499A would have violated the automatic stay because of the proposed result, so it cannot be characterized as an action. Now that there has been formal action, and consistent with the stipulated order lifting stay, FeatureGroup IP has chosen to bypass any further internal review under § 54.720(b), (c) or (d) and is proceeding with a Request for Review by the Commission as allowed by § 54.720(a).....</p>	
	10
<p>B. The Administrator’s assertion that exhaustion through the Commission and appeals to the U.S. Courts of Appeal “shall be the sole means by which UTEX’s universal service obligations and rights are quantified” fails to properly recognize that any claims – by USAC or FeatureGroup IP’s customers entitled to refunds – must be addressed under the bankruptcy laws.....</p>	
	10
<p>C. The Administrator’s assertion that FeatureGroup IP did not respond to USAC inquiries until April 27, 2011 is incorrect. FeatureGroup IP and USAC conducted a conference call on or about June 4, 2010 and FeatureGroup IP extensively explained the purpose and basis for the revised 2009 499A at that time. This factual error infects later individual decisions, addressed below.</p>	
	12
<p>D. The Decision wrongly seeks to recover interest and penalties for non-payment of amounts that were never due. FeatureGroup IP must receive a refund for the correct credit amount in immediately available funds that can then be13 matriculated through the bankruptcy process</p>	

1.	All interest and penalty amounts must be reversed because they are based on non or late payment of assessments that USAC now agrees were never due	14
2.	The Commission must order USAC to remit the full pre-petition credit to FeatureGroup IP so it can be used and treated as property of the estate	17
E.	The Administrator’s refusal to allow similar revisions for FeatureGroup IP’s 2006, 2007 and 2008 499As based on a “one-year” policy are arbitrary, capricious, not authorized by an Commission rule and illegally takes property of the estate.....	18
F.	The Administrator’s refusal to allow FeatureGroup IP to submit a further revised 2009 499A after any refunds are made through the bankruptcy process based on the illegal “one-year” policy must be reversed.....	21
G.	The Administrator’s command that FeatureGroup IP refund customer surcharge amounts related to pre-petition obligations outside of the bankruptcy process violates the bankruptcy stay and the agreed order lifting stay in part. FeatureGroup IP will follow applicable bankruptcy law and procedures for this pre-petition obligation.....	22
H.	The retention of FeatureGroup IP’s contribution from 2009 and use of the “credit” against future periods necessarily means FeatureGroup IP is a “contributor” and will be a “contributor” until all the money is returned. FeatureGroup IP must be treated as a “contributor” and able to supply a certification as such to its telecommunications vendors so that its vendors will not incur assessments on FeatureGroup IP’s revenues and pass through that obligation, to FeatureGroup IP’s detriment	23
III.	REQUEST FOR RELIEF	25
IV.	CONCLUSION AND PRAYER	25
	CERTIFICATE OF SERVICE	26

EXECUTIVE SUMMARY

FeatureGroup IP seeks review of a Decision rendered by the USAC Administrator concerning FeatureGroup IP's 2009 499A. The Administrator got the principal issue correct, but there are certain parts of the Decision with regard to implementation and with regard to revisions for prior years that are erroneous. Further, the Administrator has refused to eliminate penalties and interest charges that were imposed for non- or late payment of assessment amounts *USAC has now found were never owed*. This must be corrected.

While FeatureGroup IP will recognize the obligation to provide refunds to its customers, this must be handled through the bankruptcy process since the liability is pre-petition. Further, FeatureGroup IP cannot be compelled to refund money to customers when USAC is still holding that money. Therefore, USAC must be ordered to remit the final credit (after the precise amount is calculated) to FeatureGroup IP in useable funds so that it will truly be "property of the estate" and FeatureGroup IP will actually have money to refund.

Finally, since USAC has been retaining the credit it admits is due to FeatureGroup IP the USF rather than FeatureGroup IP has benefitted from retention of the funds. This is a "contribution." Therefore USAC must be ordered to recognize that FeatureGroup IP has been a "contributor" for each year since at least 2009 and will be until the credit is returned to FeatureGroup IP in useable funds.

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of	§	
Request for Review by UTEX	§	
Communications Corp. d/b/a	§	WC Docket No. 06-122
FeatureGroup IP (Filer ID 825102) of	§	
Decision of Universal Service	§	
Administrator	§	

**UTEX COMMUNICATIONS CORP. d/b/a FEATUREGROUP IP REQUEST FOR
REVIEW OF USAC ADMINISTRATOR DECISION**

NOW COMES UTEX COMMUNICATIONS CORPORATION d/b/a Feature Group IP (“FeatureGroup IP”) and, pursuant to sections 54.719(c), 54.720, 54.721 and 54.722 of the rules and regulations of the Federal Communications Commission (“FCC” or “Commission”), respectfully submits this Request for Review of a Decision (“Decision”) (Exhibit 1 hereto) by the Administrator of the Universal Service Administrative Company dated October 18, 2011. This Request for Review is supported by affidavit as required by § 54.721(b)(2).¹ FeatureGroup IP requests that the Commission reverse the specific parts of the USAC Decision addressed below.

I. HISTORY AND BACKGROUND

A. Description of FeatureGroup IP.

FeatureGroup IP is the entity that was the focus of the Decision, and therefore is “interested” for purposes of § 54.721(b)(1).

FeatureGroup IP is a Competitive Local Exchange Carrier and was formed to facilitate interoperation between new technology communications systems that use the Internet Protocol and the legacy public switched network. FeatureGroup IP uses its unique technical expertise and advanced networking equipment to bridge the old and the new. The purpose was to exclusively

¹ See Declaration of Richard Lewis, Exhibit 2.

provide “telephone exchange service” as defined in §153(47) to non-carrier enhanced/information service providers. FeatureGroup IP had no interest in providing originating or terminating exchange access to IXC’s or even recovering reciprocal compensation for the transport and termination it provided when LECs or CMRS providers delivered traffic to FeatureGroup IP for further delivery to FeatureGroup IP’s end user ESP customers. The business plan was to derive 100% of revenues from FeatureGroup IP’s end user customers – and no revenues from other carriers (along with no intercarrier compensation expense to other carriers) – just like the Commission said it wanted in 2001.

UTEX proceeded to implement its business plan, but soon faced extraordinary litigation problems due to an inability to secure a replacement interconnection agreement through § 252 processes. The Texas PUC did not complete the arbitration proceeding (Docket 26381, initiated in mid-2002) within 9 months; indeed it was delayed on numerous occasions at AT&T’s behest. The Wireline Bureau twice declined to preempt.² The case is *still* ongoing at the Texas PUC. A proceeding that was supposed to be completed in 9 months is now almost 10 years old. Meanwhile, FeatureGroup IP has been forced to deal with an antiquated agreement dating back to 1998.

AT&T sent FeatureGroup IP large exchange access bills for the traffic to and from FeatureGroup IP’s end user ESP customers. AT&T asserted that the traffic handled by FeatureGroup IP’s ESP customers had in fact been originated on the PSTN and were misrouted over local trunks. AT&T claimed the presence of phone numbers in signaling evidenced that the

² See Memorandum Opinion and Order, *In the Matter of Petition of UTEX Communications Corporation, Pursuant to Section 252(e)(4) of the Communications Act, for Preemption of the Jurisdiction of the Public Utility Commission of Texas Regarding Interconnection Disputes with AT&T Texas*, DA 09-2205, 24 FCC Rcd 12573 (rel. Oct. 9, 2009) (“*Initial Order Denying Preemption*”); Memorandum Opinion and Order, *In the Matter of UTEX Communications Corporation Petition for Preemption*, WC Docket 09-134, DA 10-1920, 25 FCC Rcd. 14168 (rel. Oct. 6, 2010), reconsideration pending since November 3, 2010.

traffic originated on the PSTN. In Docket 33323 (a post-ICA dispute resolution proceeding), the Texas PUC's appointed arbitrator issued an "Award" on June 1, 2009 that agreed with AT&T's contentions that access was due, based on a finding that the traffic was *not* "end user traffic" but was instead "really" traffic from other carriers that was subject to exchange access. The resulting millions of dollars amount held to be due to AT&T, along with AT&T's expressly-stated intentions to cancel the then-existing agreement (while still holding up development of a replacement agreement), forced FeatureGroup IP to file for bankruptcy protection on March 3, 2010.

B. History with USAC.

At the time of the Texas Arbitrator's Award FeatureGroup IP had filed 499As for the 2005, 2006, 2007 and 2008 calendar years. In each of those reports FeatureGroup IP treated the revenue it had received from its customers as jurisdictionally interstate "end user telecommunications revenue" subject to assessment. The state arbitrator, however, functionally reclassified FeatureGroup IP's service from a jurisdictionally interstate "telephone exchange service" provided to end users to a jurisdictionally mixed quasi-exchange access service provided to other carriers. This state-level reclassification necessarily meant that the revenue was not assessable to the extent the "carriers" were contributors – which they were. As a result, FeatureGroup IP should not have paid the assessments and deserves a refund for all assessments paid for each of those years.

Soon after the Texas Award – on July 6, 2009 – FeatureGroup IP filed a revised 2009 499A (for the 2008 calendar year) to reflect the reclassification. FeatureGroup IP also attempted to submit revised reports for 2005 (2006 499A), 2006 (2007 499A) and 2007 (2008 499A), but USAC indicated it would refuse them, citing to a "policy" limiting revisions to one year. This

policy was applied even though it is uncontested that FeatureGroup IP could not possibly have known that its classification of revenues as “end user” and therefore assessable for the 2005-2007 calendar years was “wrong.” The state Arbitrator did not find that the service was “really” to other carriers until June of 2009.

USAC initially accepted the revised 2009 499A, and issued a credit. Around August 11, 2009, however, “USAC” (using the email address “Form499”) sent an email to FeatureGroup IP’s CFO. The message said:

From: Form499
Sent: Tuesday, August 11, 2009 11:44 AM
To: 'rlewis@worldcall.net'
Subject: ISSUE 2009 FCC Form 499-A - 825102

Dear Richard:

Thank you for filing the 2009 FCC Form 499-A for filer 825102 - UTEX Communications Corp. USAC has reviewed and compared your 2009 FCC 499-A form to your company's previously filed 2009 499-A and 499-Q filings and has found the following issue(s).

- Carrier's Carrier vs. End User Revenues - Please explain the large shift of revenues between Carrier's Carrier revenues reported in block 3 and End user revenues reported in block 4 from your previously filed 2009 499A to your current 499A.

Please note that in order to report revenues in block 3 your customer must be 1) incorporating your telecommunications services into its own telecommunications offerings; and 2) contributing directly to federal universal service support mechanisms (or you have a current certification from your customer stating that all their customers are direct contributors to federal universal service support mechanisms). All other telecommunication revenues are considered Enduser and must be reported in block 4.

- The Federal USF reported on line 403, columns (d) + (e) way exceeds the Federal USF allowed by the FCC based on

the interstate and international revenue reported on line 420 columns (d) + (e). Please explain the large amount of

Federal USF reported on line 403 columns (d) + (e) as it compares to line 420 (d) + (e).

Please Note: Telecommunications carriers may not recover their federal universal service contribution costs through a separate line item that includes a mark up above the relevant contribution factor.

- Line 406 - Please verify the amount of interstate and international revenues reported on line 406.

Please Note: The jurisdictional nature of a private line or WATS line is based on traffic not the physical A and Z locations of the circuit. The 499-A instructions state that if over 10% of the traffic carried over a private line or WATS line is interstate, then the revenue and costs generated by the entire line are classified as interstate.

A response to the issue(s) presented above is required within one week of receiving this email. You may respond directly to this email or contact USAC customer service at 888-641-8722 option 2, option 1. FCC Form 499-A worksheet instructions can be found on USAC's website at www.universalservice.org/fund-administration/forms. Thank you.

Hope you are having a great day.

Sincerely,
USAC

This email, however, did not come to Mr. Lewis' attention; the specific wording of the address and subject line caused Mr. Lewis' email client to treat the message as spam. It never arrived in the inbox but was instead placed in the SPAM folder.³ Mr. Lewis was unaware that USAC had questions until many months later in approximately June, 2010. USAC, Mr. Lewis and FeatureGroup IP's bankruptcy counsel conducted a conference call on June 4, 2010.⁴ During that conference call, FeatureGroup IP explained the reasons and basis for the revised 2009 499A: that the Texas PUC Award reclassified our service and therefore our revenues.. *See* Exhibit 2 (Declaration of Richard Lewis). Thus, the Administrator's assertion that there was no "explanation" for revenue figures on the revised report is simply incorrect.

Four days after the conference call, Mr. Lawrence from USAC sent the following message:

From: Michael Lawrence [mailto:mlawrence@usac.org]
Sent: Tuesday, June 08, 2010 9:02 AM
To: martinec@mwvmlaw.com; rich@worldcall.net
Cc: David Capozzi; Stefani Watterson; Michelle Garber; David Ziebarth
Subject: FW: UTEX - ISSUE 2009 FCC Form 499-A – 825102

Dear Joe and Rich,

USAC is still waiting for a response to the inquiry below, regarding certain revenue reported on UTEX Communications Corp.'s 2009 Form 499-A revision. USAC requests that the company address these issues and respond to USAC within two weeks of this notice to substantiate the revenue reported. To further substantiate the revenue reported as carrier's carrier in Block 3, USAC also requests a list of the company's resellers, including the company names and Filer IDs.

Although the original email allows response either through email or through a phone call, USAC now requests the response only through email for documentation purposes. If you have questions regarding this inquiry please contact me in that manner.

³ FeatureGroup IP respectfully suggests that USAC change its messaging practices by changing the sending email address and subject line to something that does not so resemble actual SPAM messages.

⁴ The Administrator's Decision suggests on page 3 that there were absolutely no communications or contacts from FeatureGroup IP until April 27, 2011. This is clearly not correct. The April 8, 2011 USAC letter tentatively rejecting the revised 2009 499A (Exhibit 3) specifically mentions on page 2 both the June 4, 2010 conference call and another message from bankruptcy counsel.

Regards,

Mike Lawrence
Collections Manager
Universal Service Administrative Company
202-772-5249

Given that there had been a call on this topic only 4 days earlier, FeatureGroup IP took this message as a follow-up request that the information orally conveyed on June 4 be put in writing. Mr. Martinec (FeatureGroup IP's bankruptcy counsel) followed up with the June 26 email recounted on page 2 of Exhibit 3. Soon thereafter, however, FeatureGroup IP and AT&T became consumed in litigation in the bankruptcy case and the replacement agreement arbitration also required considerable attention for a number of months. FeatureGroup IP has limited resources and could not provide the written follow-up restating the information that had been orally provided on June 4.

C. FeatureGroup IP bankruptcy filing as it relates to USAC.

As noted, the millions of dollars amount found to be due to AT&T, along with AT&T's expressly-stated intentions to cancel the then-existing agreement (while still holding up development of a replacement agreement), forced FeatureGroup IP to file for bankruptcy protection on March 3, 2010. The case is styled *In re: UTEX Communications Corp.*, Debtor., Case No. 10-10599-CAG, in the United States Bankruptcy Court, Western District of Texas, Austin Division. On May 13, 2010 USAC filed two separate claims. *See* Exhibit 4. Those claims were consistent with USAC's prior acceptance of the revised 2009 499A.

As noted earlier, USAC and FeatureGroup IP had a conference call less than a month after USAC's proof of claim, on June 4, 2010. There was then a period of silence until April 8, 2011. USAC Director of Operations Michele Garber sent a letter tentatively rejecting the revised filing. She indicated that FeatureGroup IP could provide the promised information in writing

within 30 days and they would consider that information. She also provided as an alternative that FeatureGroup IP could let the matter become a formal decision and appeal to higher levels within USAC or to the FCC within 60 days. *See* Exhibit 3, page 3.

FeatureGroup IP responded within 30 days by letter dated April 27, 2011. *See* Exhibit 5. This was *not* an appeal. Rather, FeatureGroup IP chose the first option of working with Ms. Gerber to persuade her to not “reject” the revised form. FeatureGroup IP once again – this time in writing – explained the rationale and basis for the restatement that was orally conveyed on June 4, 2010. FeatureGroup IP’s understanding and intent in this regard is clear from its April 27, 2011 letter: it characterizes the “rejection” as tentative and committed to work with USAC to resolve the matter to avoid a formal rejection. This was no “appeal.” Indeed, FeatureGroup IP explained that a “formal” rejection that had the stated results from the tentative rejection would violate the stay in a number of specific ways.

Instead of continuing the discussion, USAC officials for some reason chose to seek a lift of stay on May 26, 2011. *See* Exhibit 6. The parties negotiated and ultimately reached an agreed order lifting the stay in part, which the court entered. *See* Exhibit 7. Two aspects of the agreed order are important. First, it does not adopt the Administrator’s present theory that the April 8 letter was a “decision” or that the April 27 letter was an “appeal.” The order makes no mention of either a “decision” or “appeal.”⁵ Indeed, that is why the parties were able to stipulate that no violation of the stay had occurred.⁶ The order clearly contemplates that USAC would consider the April 27 letter explanation and – for the first time – “issue a decision.” FeatureGroup IP in

⁵ “IT IS FURTHER ORDERED that, to the extent necessary, the stay is hereby lifted from and after the date of this Order so as to allow USAC (or a division of USAC or the Administrator) to proceed forward and respond to the Debtor’s letter of April 27, 2011 and issue a decision regarding UTEX’s USF-related obligation for calendar year 2008, in connection with the 2009 Annual True-Up.” (emphasis added)

⁶ “IT IS THEREFORE ORDERED ADJUDGED AND DECREED that, to date, no action taken by USAC has violated the automatic stay provisions of 11 U.S.C. § 362.”

turn agreed to exhaust administrative remedies, including an appeal to the Commission if necessary.⁷

The “exhaustion” requirement and the order partially lifting stay have limitations, however. Specifically:

IT IS FURTHER ORDERED that to the extent that USAC, the FCC or the federal appellate courts determine that USAC has one or more pre-petition claims against UTEX for contributions to the USF, USAC shall pursue its pre-petition claim within the bankruptcy proceedings by filing a proof of claim form and, as may be necessary, amending that form.

Further, UTEX shall be entitled to treat any pre-petition claim asserted by USAC pursuant to its a plan of reorganization, subject to (i) USAC’s right to object to any such plan; and (ii) confirmation of any such plan by this Court.

IT IS FURTHER ORDERED that to the extent that USAC, the FCC or the federal appellate courts determine that the Debtor is entitled to any credits for pre-petition overpayments into the USF, then those credits, after satisfaction of all unpaid pre-petition USF obligations, if any, shall be the property of the bankruptcy estate.

These limitations are now in issue. Certain aspects of the Administrator’s decision – if not reversed on review – would violate the requirement that after all rights, duties and obligations are established then collection and payment would occur through the bankruptcy process. USAC and/or the FCC cannot “order” some of the things contemplated in the Decision because the result would violate and be inconsistent with applicable bankruptcy rules and the agreed order.

D. Administrator Decision.

The Administrator issued the Decision on October 18, 2011. *See* Exhibit 1. FeatureGroup IP now seeks Review as is allowed by §§ 54.719(c), 54.720, 54.721 and 54.722. FeatureGroup IP

⁷ “IT IS FURTHER ORDERED that UTEX may, if it is dissatisfied with USAC’s response to the Debtor’s letter of April 27, 2011, seek review pursuant to 47 C.F.R. Part 54, Subpart I and, further, that the result of UTEX’s exhaustion of administrative remedies within USAC, the FCC and, if necessary the courts of appeal, shall be the sole means by which UTEX’s USF obligations and rights are quantified.”

is gratified that the Administrator decided that FeatureGroup IP's rationale for the revision was valid. Nonetheless, certain parts of the Decision are erroneous and must be reversed.

II. STATEMENT OF QUESTIONS PRESENTED FOR REVIEW.

- A. The Administrator was not rendering a decision on an “appeal” of USAC’s “initial rejection” of FeatureGroup IP’s revised 2009 499A. The Administrator’s “Decision” is the first formal action by USAC. The original tentative intention to “reject” the revised 2009 499A would have violated the automatic stay because of the proposed result, so it cannot be characterized as an action. Now that there has been formal action, and consistent with the stipulated order lifting stay, FeatureGroup IP has chosen to bypass any further internal review under § 54.720(b), (c) or (d) and is proceeding with a Request for Review by the Commission as allowed by § 54.720(a).**
- B. The Administrator’s assertion that exhaustion through the Commission and appeals to the U.S. Courts of Appeal “shall be the sole means by which UTEX’s universal service obligations and rights are quantified” fails to properly recognize that any claims – by USAC or FeatureGroup IP’s customers entitled to refunds – must be addressed under the bankruptcy laws.**
- C. The Administrator’s assertion that FeatureGroup IP did not respond to USAC inquiries until April 18, 2011 is incorrect. FeatureGroup IP and USAC conducted a conference call on or about June 4, 2010 and FeatureGroup IP extensively explained the purpose and basis for the revised 2009 499A at that time. This factual error infects later individual decisions, addressed below.**
- D. The Decision wrongly seeks to recover interest and penalties for non-payment of amounts that were never due. FeatureGroup IP must receive a refund for the correct credit amount in immediately available funds that can then be matriculated through the bankruptcy process.**
 - 1. All interest and penalty amounts must be reversed because they are based on non or late payment of assessments that USAC now agrees were never due.**
 - 2. The Commission must order USAC to remit the full pre-petition credit to FeatureGroup IP so it can be used and treated as property of the estate.**
- E. The Administrator’s refusal to allow similar revisions for FeatureGroup IP’s 2006, 2007 and 2008 499As based on a “one-year” policy are arbitrary, capricious, not authorized by an Commission rule and illegally takes property of the estate.**

- F. The Administrator’s refusal to allow FeatureGroup IP to submit a further revised 2009 499A after any refunds are made through the bankruptcy process based on the illegal “one-year” policy must be reversed.**
- G. The Administrator’s command that FeatureGroup IP refund customer surcharge amounts related to pre-petition obligations outside of the bankruptcy process violates the bankruptcy stay and the agreed order lifting stay in part. FeatureGroup IP will follow applicable bankruptcy law and procedures for this pre-petition obligation.**
- H. The retention of FeatureGroup IP’s contribution from 2009 and use of the “credit” against future periods necessarily means FeatureGroup IP is a “contributor” and will be a “contributor” until all the money is returned. FeatureGroup IP must be treated as a “contributor” and able to supply a certification as such to its telecommunications vendors so that its vendors will not incur assessments on FeatureGroup IP’s revenues and pass through that obligation, to FeatureGroup IP’s detriment.**

III. ARGUMENT ON QUESTIONS PRESENTED FOR REVIEW

- A. The Administrator was not rendering a decision on an “appeal” of USAC’s “initial rejection” of FeatureGroup IP’s revised 2009 499A. The Administrator’s “Decision” is the first formal action by USAC. The original tentative intention to “reject” the revised 2009 499A would have violated the automatic stay because of the proposed result, so it cannot be characterized as an action. Now that there has been formal action, and consistent with the stipulated order lifting stay, FeatureGroup IP has chosen to bypass any further internal review under § 54.720(b), (c) or (d) and is proceeding with a Request for Review by the Commission as allowed by § 54.720(a).**

The Decision erroneously claims to be an “evaluation” of an “appeal” by FeatureGroup IP. This is an incorrect characterization of the procedural posture. The April 8, 2011 letter gave FeatureGroup IP two options: respond to the letter with further information or allow the “rejection” to become final and then appeal within 60 days of the letter. Even USAC recognized this was the case. Paragraph 24 of USAC’s Motion to Lift Stay (Exhibit 6) on page 9 expressly recognized this choice:

24. The letter further indicated that the Debtor had two possible administrative remedies available if it wished to dispute USAC’s decision to reject of the Revised 499-A Form: (i) it could respond to USAC and provide the requested information to support the Revised 499-A Form in writing no later than

30 calendar days from the date of the letter; or (ii) it could appeal USAC's decision to the FCC.⁸

FeatureGroup IP chose the first option (to “dispute”) instead of allowing the tentative action to become final and then appeal. Indeed, the initial inclination to reject the revised 2009 499A was never formalized. The procedural difference has a material impact in this case. As will be explained below, the Decision on page 5 – after agreeing that the reclassification was reasonable and the revisions were proper – nonetheless attempts to impose late payment penalties for non payment of post-petition USF contributions for 2010 and 2011. Now that the revised 2009 499A report has been accepted as valid, there are, were and will be no amounts due for 2010 or 2011.⁹ The Administrator is trying to recover late payment penalties for non-payment of amounts the Administrator has now held were never due. Calling FeatureGroup IP's April 27, 2011 “dispute” an “appeal” as the basis to argue there was somehow a nonpayment of amounts related to 2010 and 2011 that were not and are not due (now that the revised 2009 499A has finally been accepted as valid) is unreasonable procedural gaming. There was not an “appeal” to the Administrator. The Decision is the first formal action by USAC. There never were any amounts due once the revised 2009 499A was filed, up to the bankruptcy petition date or after the petition. Thus there can not lawfully be any interest or penalties.

⁸ The USAC Motion to Lift Stay incorrectly asserts FeatureGroup IP did not take either option, but then admits in the next paragraph that FeatureGroup IP *did* take the first option by submitting the April 27, 2011 letter (Exhibit 5). Although the Motion to Lift Stay dismisses the explanation in that letter as “unrelated” as “unresponsive” the Decision expressly agrees that the explanation presents valid reasons for the revised 2009 499A and the revenue reclassification it contained. Decision pages 4-5. Thus, the Administrator now admits its characterization and criticism of the letter in the Motion to Lift Stay was unfounded.

⁹ The entirety of the amounts currently being billed by USAC for post petition periods all relate to interest and penalties for nonpayment of assessment calculations and billings that have now been reversed. This is addressed in Part E.1 below.

- B. The Administrator’s assertion that exhaustion through the Commission and appeals to the U.S. Courts of Appeal “shall be the sole means by which UTEX’s universal service obligations and rights are quantified” fails to properly recognize that any claims – by USAC or FeatureGroup IP’s customers entitled to refunds – must be addressed under the bankruptcy laws.**

FeatureGroup IP agreed to exhaust administrative remedies. The Commission administrative process – with recourse to the courts of appeal – will “be the sole means by which UTEX’s USF obligations and rights are quantified” (emphasis added). The determination of amounts owed and by whom occurs here. It all then goes back to the bankruptcy court and provision for payment as part of the reorganization process. USAC will be obliged to pay the refund that will be due, “after satisfaction of all unpaid pre-petition USF obligations.” Any obligation FeatureGroup IP may have to refund amounts to its customers (*see* Decision pages 6-7) will also be satisfied using the bankruptcy process, and only after FeatureGroup IP receives the credit from USAC in useable funds. To the extent the Administrator meant anything other than this in the Decision, the Commission must reverse.

- C. The Administrator’s assertion that FeatureGroup IP did not respond to USAC inquiries until April 27, 2011 is incorrect. FeatureGroup IP and USAC conducted a conference call on or about June 4, 2010 and FeatureGroup IP extensively explained the purpose and basis for the revised 2009 499A at that time. This factual error infects later individual decisions, addressed below.**

The Administrator’s assertion that FeatureGroup IP did not respond to USAC inquiries until April 27, 2011 is incorrect, and belied by USAC’s own correspondence. *See* Exhibit 3 (USAC April 8, 2011 letter), page 2 (admitting to June 4, 2010 telephonic conference and email from bankruptcy counsel). During the June 4, 2010 telephonic conference call, FeatureGroup IP orally provided the same explanation that the Decision now accepts. *See* Exhibit 2 (Declaration of Richard Lewis). Thus, the Administrator’s assertion that there was no “explanation” for revenue figures on the revised report is simply incorrect. To the extent this claimed

unresponsiveness forms the basis for any of the challenged aspects of the Decision then that basis is unfounded and the challenged part must be reversed.

D. The Decision wrongly seeks to recover interest and penalties for non-payment of amounts that were never due. FeatureGroup IP must receive a refund for the correct credit amount in immediately available funds that can then be matriculated through the bankruptcy process.

The practice at USAC when a contributor submits a revised 499A that shows reduced assessable revenues and thus lowers the contribution obligation for the applicable year is to issue a “credit” rather than a refund. The “credit” is then amortized against obligations for future periods until depleted. FeatureGroup IP is not aware of any Commission rule that specifically authorizes this practice. USAC has applied this practice to FeatureGroup IP. The “credit” balance resulting from the Decision must be remitted to FeatureGroup IP since it is “pre-petition.” Further, the current balance being billed by USAC and claimed as “post petition” administrative claims is purely related to “interest” and “penalty” for non-payment of USC contribution amounts that have now been removed. As a result, USAC must write a check for the pre-petition credit balance and submit a corrected invoice for post-petition administrative claims that has a zero balance.

According to USAC’s calculation of the credit due from the now-accepted revised 2009 499A is \$104,023.11. *See* Decision page 4; Exhibit 3 page 2.¹⁰ This credit was carried forward for each subsequent reporting period. Indeed, the credit grew larger in subsequent periods because FeatureGroup IP had no contribution obligation for the 2009 calendar year or the first two months of the 2010 calendar year, to the point that the credit balance as of the date of the bankruptcy petition was \$131,995.57 according to USAC. *Id.*

¹⁰ By using the figures stated in the tentative rejection and in the Decision, FeatureGroup IP is not necessarily agreeing with the calculations. With all due respect, there are certain aspects of that calculation we simply cannot understand. The use of USAC’s figures here is merely to maintain consistency of discussion.

USAC's calculation of the effect of a rejection of the revised 2009 499A, however, was a reversal of the credit balance as of bankruptcy filing date by \$104,840.02¹¹ – from \$131,995.57 to \$27,155.55. USAC somehow came up with the proposition that FeatureGroup IP would actually *owe* an additional \$816.91 for 2008 revenues as reflected on the original 499A. *Id.* Then, USAC would have attributed this \$816.91 to the second quarter of 2011¹² – which is clearly post-petition.

As indicated on page 4 of the Decision, USAC invoiced this \$816.91 “in three equal installments over the second quarter of 2011.” *See* Exhibit 8 (April, May and June 2011 invoices). USAC therefore originally intended to move pre-petition obligations over to the post-petition period. This was obviously not proper. This contemplated action was why FeatureGroup IP claimed on page 2 of the April 27, 2011 letter (Exhibit 5) that if USAC formalized its tentative result it would violate the automatic stay. Fortunately, USAC has now apparently recognized this problem and its November 22, 2011 reconciliation (Exhibit 9) completes the reversal of the original \$816.91 and the associated accumulated interest they had been charging post-petition.

1. All interest and penalty amounts must be reversed because they are based on non or late payment of assessments that USAC now agrees were never due.

On November 22, 2011, USAC sent FeatureGroup IP its invoice that purports to reflect the reconciliation of the Decision to prior billings. *See* Exhibit 9. The calculation backs out the aforementioned \$816.91 and \$104,023.11, leaving an “outstanding balance” of \$600.91 (the sum

¹¹ Notice that the reversal would have been \$104,804.02 rather than the original \$104,023.11. The difference is the \$816.91 mentioned in the same paragraph of the Decision. This is what USAC originally thought FeatureGroup IP would owe in additional contribution for 2008 revenues if the revised 2009 499A had been rejected.

¹² “This resulted in USAC reversing the \$104,023.11 in credits that were issued based on UTEX’s revised 2009 FCC Form 499-A and invoicing UTEX for the additional \$816.91 in universal service obligations owed in three installments over the second quarter of 2011.” (emphasis added)

of \$594.49 claimed to be the “previous balance” from the prior month, and then \$6.42 in interest on the \$549.49). The problem, however, is that the \$594.49 and now the \$6.42 are merely the accumulated interest and penalties over all post-petition months *for post-petition assessment amounts USAC initially billed but has now backed out and has ultimately agreed is not due, either pre- or post-petition*. In other words, none of the entire amount (\$600.91) USAC says is presently due has anything to do with any valid USF obligation, and is entirely interest on or a penalty for nonpayment of a “principal” that we now know never existed. Further, some of the accumulated interest and penalties are actually related to **pre-petition** assessment amounts that the Decision now admits were never due. *See* Exhibit 2 (Declaration of Richard Lewis).

The following chart shows the penalty and interest amounts that have been billed by USAC on a post-petition basis for invoices through the November 22, 2011 reconciliation invoice (Exhibit 9):

<u>Invoice Month</u>	<u>Penalty and Interest Charged</u>	<u>Running Balance</u>
9/10	\$34.17	\$34.17
10/10	\$31.06	\$65.23
11/10	\$118.61	\$183.84
12/10	\$58.66	\$242.50
1/11	\$58.66	\$301.16
2/11	\$62.57	\$363.73
3/11	\$54.75	\$418.48
4/11	\$60.62	\$479.10
5/11	\$0.00	\$479.10
6/11	\$63.00	\$542.10
7/11	\$31.03	\$573.13
8/11	\$5.24	\$578.37
9/11	\$7.54	\$585.91
10/11	\$8.58	\$594.49
11/11	\$6.42	\$600.91

The sum of penalty and interest charges USAC has charged during the post-petition period precisely matches the claimed current balance. This makes absolutely clear that 100% of the amount USAC claims is due on a post-petition basis is nothing but “interest” and “penalties”

from pre-petition¹³ and post-petition “contribution” amounts that were later reversed. As a result of the Decision accepting the revised 2009 499A there was never any “principal” that was unpaid or paid late. The Commission must instruct USAC to withdraw the \$600.91 in interest charges.

The bankruptcy process requires that the debtor and all creditors establish a clear line of demarcation between pre-petition obligations and rights to payment and any post-petition obligations and rights to payment. The Decision purports to recognize bankruptcy requirements, but does not actually follow them, in that that issues and amounts (specifically interest and penalties) related to now-vacated pre-petition obligations are incorrectly attributed to post-petition issues and amounts and apparently treated as administrative claims as if they were actually post-petition. This is not allowed under the bankruptcy laws.

USAC did send invoices for claimed post-petition contribution amounts. This can be seen by reviewing USAC’s May 21, 2010 invoice (Exhibit 10). This is the invoice that attempted to implement the removal of pre-petition obligations. After USAC’s calculation of the “Bankruptcy A/R Adjustment” a “Current Balance” of \$4,174.43. FeatureGroup IP takes this to represent amounts USAC was then claiming were “post-petition.” The June 22, 2010 invoice (Exhibit 11) claimed an additional \$1,423.93 was due “post-petition” for a total of \$5,598.36. USAC billed penalties and interest on these amounts for many months. However, USAC’s July 22, 2011 invoice (Exhibit 12) reversed the \$5,598.36 by issuing a credit in that exact amount. They did not, however, credit the accumulated interest. The \$573.13 shown as the remaining balance on Exhibit 12 is entirely interest and penalties. USAC’s invoices after July carried forward this \$573.13 and added interest and penalties. The accumulation sums to the \$594.49 claimed as “Previous Balance” in the November 22, 2011 invoice (Exhibit 9). That invoice then (after

¹³ USAC’s March 2010 invoice was not pro-rated for the March 3, 2010 bankruptcy filing and thus a small portion of this invoice should have been properly recorded as pre-petition.

attempting to reconcile the acceptance of the revised 2009 499A) adds \$6.42 in additional interest, with the result that USAC now says FeatureGroup IP owes the USF \$600.91 on a post-petition basis. The problem is this amount is entirely composed of interest and penalties accruing over time on assessment amounts that were billed but then later reversed.

The Decision asserts that the “late payment penalties” were “entirely the result of UTEX’s failure to make timely payments toward its post-petition universal service obligations.” See Decision page 5. This is simply incorrect. There were no such obligations, as we now know. The entire post-petition amount USAC now claims is due is entirely related to *interest and penalties* on assessment amounts that have all now been credited back because they were never properly due to begin with.

Interest and penalties for non-payment of amounts not due – including assessment amounts that were actually pre-petition – cannot constitute a reasonable administrative obligation on a post-petition basis. FeatureGroup IP requests that the Commission require USAC to remove all interest and penalties for non or late payment of assessment amounts (whether pre- or post-petition) that are now known to have been in error.

FeatureGroup IP asserts that no reasonable judicial forum would allow an administrative claim for interest and penalties for nonpayment of a “principal” amount that has been found to have been assessed in error. FeatureGroup IP never owed the assessment, and cannot lawfully be charged interest or penalties for non or late payment of amounts that we now know were never due.

2. The Commission must order USAC to remit the full pre-petition credit to FeatureGroup IP so it can be used and treated as property of the estate.

The stipulated Order Lifting Stay provides that:

IT IS FURTHER ORDERED that to the extent that USAC, the FCC or the federal appellate courts determine that the Debtor is entitled to any credits for pre-

petition overpayments into the USF, then those credits, after satisfaction of all unpaid pre-petition USF obligations, if any, shall be the property of the bankruptcy estate.

USAC now agrees that FeatureGroup IP is entitled to a credit of \$104,840.04.¹⁴ The Order Lifting Stay expressly states that FeatureGroup IP's net credit for pre-petition amounts "shall be the property of the bankruptcy estate." Given that the pre-petition credit cannot be intermingled with any post-petition obligations (which are zero in any event after the interest and penalties are removed) the only proper recourse is for USAC to tender payment to FeatureGroup IP so that these funds may truly be "property of the estate" and used to defray obligations to other creditors or as directed by the bankruptcy court.

FeatureGroup IP also contends that it cannot be required to refund any amount to any of its customers until it gets back the credit in cash. USAC is presently holding the money it has simultaneously instructed FeatureGroup IP to refund. FeatureGroup IP cannot be required to refund amounts to its customers that were paid in to the fund and have yet to be returned. USAC has the money it has told FeatureGroup IP to refund. When we receive the pre-petition credit in cash we will then recognize the pre-petition liability as part of our reorganization plan. If we do not receive the credit it cannot truly be "property of the estate." Nor can FeatureGroup IP make any refunds because until the credit is paid back to FeatureGroup IP USAC has the money that is supposed to be refunded.

E. The Administrator's refusal to allow similar revisions for FeatureGroup IP's 2006, 2007 and 2008 499As based on a "one-year" policy are arbitrary, capricious, not authorized by an Commission rule and illegally takes property of the estate.

FeatureGroup IP attempted to submit revised 499As for 2005 (2006 499 A), 2006 (2007 499 A) and 2007 (2008 499 A). On Decision page 6, the Decision held that "USAC is prohibited

¹⁴ This is the sum of credits acknowledged in USAC's November 22, 2011 invoice on page 3 (Exhibit 9).

from accepting a downward revision of an FCC Form 499-A after the FCC-mandated one-year deadline.”¹⁵

This is the same issue that is pending before the Commission in other cases.¹⁶ FeatureGroup IP therefore challenges the Decision to apply the One-Year Filing Deadline to FeatureGroup IP’s attempt to submit revised 499As for, 2006, 2007 and 2008 on the same grounds as asserted by those other companies.

AT&T challenged the One Year Downward Adjustment Deadline as a substantive rule adopted outside the scope of the Bureau’s delegated authority, which precluded the Bureau from making substantive changes to the Form 499-A instructions.¹⁷ AT&T also challenged the One Year Downward Adjustment Deadline because it is a substantive rule and was adopted without following the notice and comment rulemaking requirements under Section 553 of the Administrative Procedure Act.¹⁸ In addition, AT&T contested the One Year Downward Adjustment Deadline as being arbitrary and an abuse of the Bureau’s discretion. AT&T noted that it is arbitrary for a filer to be precluded from making downward modifications after one year had passed when there is no time limit to modifications that would increase a filer’s contribution base.¹⁹

¹⁵ The associated footnote to this part of the Decision cites to *In re Federal-State Joint Board on Universal Service, 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket Nos. 96-45, 98-171, 97-21, Order, 20 FCC Rcd., 1012, 1016-18, ¶¶ 10-14 (2004).

¹⁶ See, *XO Communications Services, LLC, Request for Review of Decision of the Universal Service Administrator*, WC Docket No. 06-122 (filed December 29, 2010); *Qwest Communications International Inc. Application for Review*, CC Dkt. No. 96-45 (filed Jan. 10, 2005); *SBC Communications Inc. Application for Review of Action Taken Pursuant to Delegated Authority*, CC Dkt. Nos. 96-45, 98-171, 97-21 (filed Jan. 10, 2005); *Business Discount Plan, Inc. Application for Review*, CC Dkt. No. 96-45 (filed Jan. 10, 2005).

¹⁷ AT&T Application at 7-9. Accord Qwest Application at 7-8. See *In re 1998 Biennial Regulatory Review*, 14 FCC Rcd 16602, 16621 ¶ 39 (1999).

¹⁸ AT&T Application at 7-10. See 5 U.S.C. §553. Accord Qwest Application at 3-7, BDP Application at 12-19.

¹⁹ AT&T Application at 10-11.

Qwest observed that under the federal income tax code, the same statute of limitations period applies to both underpayments and overpayments, and the Internal Revenue Code allows netting of overpayments and underpayments for applicable years still open under the statute of limitations.²⁰ Qwest also correctly explained that the rule is arbitrary and capricious because any purported benefit from the rule – promoting “vague policy objectives regarding the administrative efficiency, certainty, and integrity of the Commission’s contribution system” – is completely outweighed by the harms resulting from the rule: prohibiting parties from making changes to original reports made in good faith in the face of the incredible complexity of the contribution rules often based on arcane legal classifications and difficult technical distinctions.²¹

In FeatureGroup IP’s case, the original reports were based on a good faith and honest attempts to classify revenues; indeed the original classification was one that led to a large contribution burden. But it was not until June of 2009 that the state Arbitrator held that these were not in fact end user revenues and were instead carrier’s carrier revenues. By then, the one year deadline had long passed for the 2006, 2007 and 2008 499As. FeatureGroup IP could not be charged with any form of negligence or lack of diligence. FeatureGroup IP could not have been expected to reasonably “discover” the erroneous revenue classification until the state Arbitrator ruled. When the Texas Award was released, FeatureGroup IP acted quite promptly to submit revised reports.

Consider what would happen if the initial revenue classifications had been the other way with the result that FeatureGroup IP’s initial 2009 499A showed much lower assessable telecommunications revenue. If FeatureGroup IP had originally classified the revenues as “carriers’ carrier” for all those years only to be told that the revenue was actually end user, then

²⁰ Qwest Application at 17, citing 5 U.S.C. §§ 6402 and 6501.

²¹ Qwest Application at 11-17.

USAC would be hustling to collect the additional contribution burden for each of the prior years. USAC would benefit from the “discovery” flowing from the state Arbitrator finding. The discovery rule must be both ways.

FeatureGroup IP – like the other carriers – submits that One Year Filing Deadline was unlawfully adopted and is arbitrary and capricious as applied to FeatureGroup IP, for the same reasons set forth in the AT&T, Qwest, BDP and XO cases. In the event that the Commission grants these pending Applications for Review, FeatureGroup IP requests that the Commission require USAC to accept FeatureGroup IP’s revised 499As for 2005 (2006 499A), 2006 (2007 499 A) and 2007 (2008 499 A).

F. The Administrator’s refusal to allow FeatureGroup IP to submit a further revised 2009 499A after any refunds are made through the bankruptcy process based on the illegal “one-year” policy must be reversed.

The Decision on pages 6-7 requires FeatureGroup IP to provide refunds to its customers that paid USF passthrough surcharges in 2008. FeatureGroup IP does not mind doing so, but as discussed in the next issue point this must occur in the bankruptcy process, since this is a pre-petition obligation. Equally important, we must receive our credit in cash before we pay any refund.

Disbursement of any refunds will require a further revision to the 2009 499A. The Decision acknowledges as much by noting that refunds “would normally prompt a downward adjustment to Line 403 of the form.” The next sentence however, purports to prohibit submission of a further revised 499A based on the One-Year Filing Deadline even though the Decision itself acknowledges such a change would otherwise be appropriate.

This application of the One-Year Filing Deadline dramatically exposes how arbitrary the so-called One-Year Filing Deadline is: FeatureGroup IP is being ordered to make refunds by the

government but simultaneously prohibited from properly reflecting the accounting effect of those refunds through a revised 499A in the proper year.

This is not just a paper chase. Revenue from customers that pay USF passthroughs is part of the USF assessment base and carriers must pay the USF assessment on that revenue. The \$119,594²² received from customers is in the form of a passthrough. The refusal to allow submission of a revised form means that UTEX will not be able to recover the approximate \$13,000 in additional assessment that was levied on that revenue which the Decision has ordered to be refunded, based purely on the fact that the Decision was rendered more than a year since the 2009 499As were filed.

With all due respect, FeatureGroup IP cannot be reasonably subjected to such arbitrary treatment, particularly given the uneven and suspect legal basis for the so-called One-Year Filing Deadline to begin with. The Commission should require USAC to allow FeatureGroup IP to revise the 2009 499A to reflect the refunds by making the downward adjustment to line 403 after the refunds are made.

G. The Administrator's command that FeatureGroup IP refund customer surcharge amounts related to pre-petition obligations outside of the bankruptcy process violates the bankruptcy stay and the agreed order lifting stay in part. FeatureGroup IP will follow applicable bankruptcy law and procedures for this pre-petition obligation.

FeatureGroup IP acknowledges the refund obligation. This is, however, complicated by the fact of FeatureGroup IP's bankruptcy: this will be a pre-petition obligation. If the Decision contemplates that FeatureGroup IP must immediately sit down and write checks outside of the bankruptcy process and before FeatureGroup IP receives the funds from USAC, it errs. Instead, the law requires that this be handled as part of any reorganization plan, and treatment according to the bankruptcy laws and rules.

²² See Decision page 3 (reflecting passthrough revenue reported in revised 2009 499A).

Further, as noted until FeatureGroup IP receives the credit amount in cash so it can be used as property of the estate there is nothing to refund. USAC still has the money it has ordered FeatureGroup IP to refund. Therefore, any refund obligation must be conditioned on USAC's prior remittance of the credit amount to FeatureGroup IP.

The customers²³ will have to get in line with the other creditors of the proper class and receive the amounts approved by the bankruptcy court as part of the plan. FeatureGroup IP will handle this matter in that fashion. FeatureGroup IP, however, cannot and therefore will not provide any refunds until we first receive the credit in cash from USAC because otherwise we *do not have the money that is supposed to be refunded*. If the Commission believes some other process should apply then it should so state as part of the determination on this Request for Review and FeatureGroup IP will review its options at that point.

H. The retention of FeatureGroup IP's contribution from 2009 and use of the "credit" against future periods necessarily means FeatureGroup IP is a "contributor" and will be a "contributor" until all the money is returned. FeatureGroup IP must be treated as a "contributor" and able to supply a certification as such to its telecommunications vendors so that its vendors will not incur assessments on FeatureGroup IP's revenues and pass through that obligation, to FeatureGroup IP's detriment.

USAC has been holding FeatureGroup IP's property – an amount USAC calculates to be \$104,840 – since 2009. FeatureGroup IP has been denied the use of those funds. FeatureGroup IP has not earned interest on those funds, so FeatureGroup IP has suffered at minimum by the time value of those funds between July 6, 2009 and the present. This situation will continue for so long as USAC is withholding FeatureGroup IP's funds. The USF has enjoyed the benefit of retention of the funds and will continue to do so until they are returned. This is without question a "contribution." Yet FeatureGroup IP has been listed on the 499 Filer Database as a "non-

²³ Assuming they meet the bar date.

contributor” for much of this same period. *See* <http://apps.fcc.gov/cgb/form499/499detail.cfm?FilerNum=825102>.

Like most carriers, FeatureGroup IP must procure services from other FCC Filer entities in order to run its business. Those providers are required by the rules to check the 499 Filer Database to determine whether FeatureGroup IP is a contributor. Since FeatureGroup IP is not listed as a contributor these entities must treat FeatureGroup IP’s revenues as “end user” revenues, and pay an assessment on them. They then naturally seek to pass that cost through to FeatureGroup IP. *See* Exhibit 2 (Declaration of Richard Lewis).

FeatureGroup IP explained this problem to the Administrator by using a specific example (Exhibit 5, pages 4-5), but the issue was deemed “moot” on page 7 of the Decision. With all due respect, it is not moot. The present situation is that FeatureGroup IP is in fact contributing to the USF because of at least the time value of the retained amount, but is not being treated as a contributor. Then FeatureGroup IP’s vendors pay an assessment on the revenue received from FeatureGroup IP and pass it through. FeatureGroup IP is therefore a “contributor” but its status as such is not being properly recognized, to the detriment of both FeatureGroup IP and its vendors.

FeatureGroup IP respectfully requests that the Commission instruct USAC to change FeatureGroup IP’s designation to that of “contributor”; rule that FeatureGroup IP has been a contributor for the entire period since 2009 and hold that (1) all FeatureGroup IP vendors may submit revised 499As for any period since 2009 that treats the revenue they received from FeatureGroup IP as “carriers’ carrier” rather than “end user” and recoup the assessment they paid and then (2) refund any passthrough amounts they recovered from FeatureGroup IP on account of its incorrectly deemed noncontributor status with the resulting incorrect classification of

revenues as “end user.” This is the only result that will make all parties whole and prevent unjust enrichment by the USF though double recovery.

IV. REQUEST FOR RELIEF.

FeatureGroup IP respectfully requests that the Commission grant this Request for Review, hold that the Decision is erroneous for the reasons stated above and instruct USAC to take the actions sought above.


V. CONCLUSION AND PRAYER

The Administrator got the big question right: FeatureGroup IP’s revised 2009 499A had a reasonable basis and should have been accepted. Other parts of the Decision, however, contain error. The Commission must now remedy those final remaining problems by issuing appropriate instructions to USAC.

WHEREFORE, PREMISES CONSIDERED, UTEX Communications Corp. d/b/a FeatureGroup IP requests that the Commission grant this Request for Review and issue an Order instructing USAC to correct the errors identified above, and then remit FeatureGroup IP’s full credit in useable funds.

Respectfully Submitted,

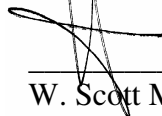
UTEX COMMUNICATIONS CORP.
d/b/a FEATURE GROUP IP

by: 
W. Scott McCollough
General Counsel
1250 S Capital of Texas Hwy
Bldg 2-235
West Lake Hills, TX 78746
(V) 512.888.1112
(FAX) 512.692.2522
scott@worldcall.net

December 19, 2011

CERTIFICATE OF SERVICE

I certify that in accordance with § 54.721(c) I served a copy of this Request for Review on the USAC Administrator consistent with the requirement for service of documents set forth in § 1.47 on December 19, 2011.



W. Scott McCollough